IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

ROBERT R. KAMMARCAL,	)	**No. 27352-1-III**
	)	
Appellant,	)	
	)	
v.	)	**Division Three**
	)	
DELBERT W. OWEN and DEBRA L. OWEN, husband and wife,	)	
	)	
	)	
Respondents.	)	**UNPUBLISHED OPINION**

Korsmo, J. — Robert Kammarcal appeals a bench verdict rejecting his claim that Delbert and Debra Owen falsely concealed defects in the Newman Lake house they sold to him. Credibility determinations made by the trier-of-fact are not subject to review by an appellate court. The testimony supported the bench findings. Therefore, we affirm the judgment below.

FACTS

The house was built in 1923. The Owens owned property behind it at the time they purchased the home from an estate in 2001 for only $17,000. At the time, there was

a dispute about the common boundary between the two properties. The house was in terrible condition, smelling of urine and requiring a large amount of interior work. It had been occupied by an elderly lady. The Owens purchased the property with the intent to either rent or live in it.

Extensive remodeling work soon commenced. Mr. Owen, a former contractor, did much of the work himself or with the help of a friend. New floors were installed throughout the house, a subfloor was replaced in the bathroom, and the kitchen floor was leveled. The residence was re-sided and re-roofed. A new hot water tank was installed and the kitchen cabinets refinished. A decorative rock façade was placed around the base of the house and the property was landscaped. The house was then rented for two years before the Owens moved into it. They stayed about two more years before they listed the property for sale for $182,500.

Mr. Kammarcal, who lived in Vancouver, Washington, found the property listed on the Internet. After viewing pictures of the house, he made an offer on the property on July 8, 2005, even though he had never seen it. The sale closed August 4, 2005.

Mr. Kammarcal viewed the property on July 10. He had an inspector, Tom Ashenbrenner, inspect the property the next day. The inspection noted soft spots in the floor and that the floors were uneven. The report indicated that the situation should be

monitored to see if repairs were needed. No other defects were noted.

Shortly after Mr. Kammarcal moved in, he plugged his television set into the wall and it caught on fire. The outlet had been wired for 220 volts, but was only equipped for 120 volts. Mr. Ashenbrenner then refunded his inspection fee and paid additional money to reimburse Mr. Kammarcal for the television.

Mr. Kammarcal soon discovered that the toilet was not bolted down and that the kitchen sink plumbing was loose and leaking. He repaired both of those problems himself.

Major problems developed with the floor. Mr. Kammarcal was in the spare bedroom about nine months after moving in when the floor suddenly dropped a couple of inches. In April, 2007, Mr. Kammarcal's fiancé moved the bed and dresser and then fell through the floor. Underneath it was dirt.

Three contractors inspected the premises for Mr. Kammarcal. All of the contractors agreed that the house was not sitting on a concrete slab and that there was wood rot and mold underneath. All opined that it likely took years to develop, with estimates ranging from two to three years to more than five or six years.

Mr. Kammarcal filed suit against the Owens on July 26, 2007, claiming fraud based on defects in the house. The matter ultimately proceeded to bench trial before a

pro tem superior court judge, the Honorable Paul Bastine, on June 16-17, 2008. The trial court denied relief, determining that Mr. Kammarcal had failed to prove two elements of his fraud claim: (1) that the Owens had knowledge of the condition of the floors; and (2) that diligent and appropriate inspection by Mr. Kammarcal would not have disclosed the potential problems with the property. The trial court entered judgment in favor of the Owens and also awarded them statutory attorney fees of $200.

Mr. Kammarcal timely appealed to this court.

ANALYSIS

The parties raise several issues, but we need only address one of them.[1] A failure to convince the trier-of-fact is simply not meaningfully reviewable on appeal.

We review the trial court's decision following a bench trial to determine whether the findings are supported by substantial evidence and whether those findings support the conclusions of law. *Dorsey v. King County*, 51 Wn. App. 664, 668-669, 754 P.2d 1255, *review denied*, 111 Wn.2d 1022 (1988). Substantial evidence is the quantum of evidence

[1] We exercise our discretion to address the merits of this appeal despite any "technical flaws" in failing to assign error to the judgment. Appellant has made detailed challenges to the trial court's factual findings and has clearly described his challenge in his statement of the issues and his argument, so review is appropriate. RAP 10.3(g); *State v. Olson*, 126 Wn.2d 315, 323, 893 P.2d 629 (1995). We also note that the primary authority relied upon by Respondents on this issue, *State v. Fortun*, 94 Wn.2d 754, 626 P.2d 504 (1980), was overruled in *Olson* on this point. *See* 126 Wn.2d at 320-321.

sufficient to persuade a rational, fair-minded person the premise is true. *In re Estate of Jones*, 152 Wn.2d 1, 8, 93 P.3d 147 (2004); *Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wn.2d 169, 176, 4 P.3d 123 (2000). In determining the sufficiency of evidence, an appellate court need only consider evidence favorable to the prevailing party. *Bland v. Mentor*, 63 Wn.2d 150, 155, 385 P.2d 727 (1963). In evaluating the persuasiveness of the evidence and the credibility of witnesses, we must defer to the trier of fact. *Burnside v. Simpson Paper Co*., 123 Wn.2d 93, 108, 864 P.2d 937 (1994). "[C]redibility determinations are solely for the trier of fact [and] cannot be reviewed on appeal." *Morse v. Antonellis*, 149 Wn.2d 572, 574, 70 P.3d 125 (2003). Unchallenged findings of fact are also verities on appeal. *Jones*, 152 Wn.2d at 8; RAP 10.3(g). We review questions of law *de novo*. *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 879-880, 73 P.3d 369 (2003).

The parties agree that Mr. Kammarcal had to establish five elements in order to prevail on his fraudulent concealment claim: (1) there was a concealed defect in the dwelling; (2) the vendor had knowledge of the defect; (3) the defect presented a danger to the property, health, or life of the purchaser; (4) the defect was not known to the purchaser; and (5) the defect would not be disclosed by careful, reasonable inspection by the purchaser. *Alejandre v. Bull*, 159 Wn.2d 674, 689, 153 P.3d 864 (2007); *Stieneke v.*

Russi, 145 Wn. App. 544, 560, 190 P.3d 60 (2008), *review denied*, 165 Wn.2d 1026 (2009); *Nguyen v. Doak Homes*, *Inc.*, 140 Wn. App. 726, 732, 167 P.3d 1162 (2007). The elements of fraudulent concealment must be established by clear, cogent, and convincing evidence. *Stieneke*, 145 Wn. App. at 561.

The trial court concluded that neither element two (vendor's knowledge) nor element five (purchaser's inability to discover by inspection) were proven by clear, cogent, and convincing evidence. We need only address the second element in our analysis.

Appellant contends that he presented sufficient circumstantial evidence to show that Mr. Owen had knowledge of the defective condition of the floors resting in dirt instead of on a slab. He is partially correct. He presented sufficient evidence that the trier-of-fact *could* have made such a finding. His problem, however, is that the trial court was not persuaded by that evidence. Instead, the trial court found that respondents did not have "any actual knowledge of the problems with the floor other than that the floors were uneven." Clerk's Papers 13 (finding no. 7).

The basic problem with appellant's argument is that it is directed to the wrong court. The function of the appellate court is to review the action of the trial courts. Appellate courts do not hear or weigh evidence, find facts, or substitute their opinions for

those of the trier-of-fact. Instead, they must defer to the factual findings made by the trier-of-fact. *See*, *e.g.*, *Thorndike v. Hesperian Orchards*, *Inc.*, 54 Wn.2d 570, 572, 575, 343 P.2d 183 (1959).

It is one thing for an appellate court to review whether sufficient evidence supports a trial court's factual determination. That is, in essence, a legal determination based upon factual findings made by the trial court. In contrast, where a trial court finds that evidence is insufficient to persuade it that something occurred, an appellate court is simply not permitted to reweigh the evidence and come to a contrary finding. It invades the province of the trial court for an appellate court to find compelling that which the trial court found unpersuasive. Yet, that is what appellant wants this court to do. There was conflicting evidence in this case.[2] The trial judge weighed that conflicting evidence and chose which of it to believe. That is the end of the story.

The testimony at trial with respect to element two illustrates the matter. There was testimony that Mr. Owen had worked as a contractor. He also knew that the floor of the bathroom, which he described as an addition to the house, was over dirt instead of a concrete slab. Given the sad state of the flooring at the time he replaced it, a trier-of-fact

[2] We have carefully reviewed the record with respect to each of the 15 findings appellant has challenged. There is evidence supporting each of them. We will not belabor this opinion to cite the testimony supporting each finding since it is not necessary to the outcome.

could have concluded that an experienced person with that knowledge would have known that the floor problems likely were the result of decaying floor supports. The act of putting the façade around the house concealed the problem.

A contrary finding was also supported by the record. Mr. Owen testified he did not believe the house rested in dirt. Appellant's own experts testified that the floor mold they observed in 2007 had existed from two to six years. That is, that the mold had only been present since the repairs made by Mr. Owen in 2001. In short, rather than concealing the problem, Mr. Owen may have unknowingly created the problem by placing the façade around the house that prevented proper ventilation.

Either of these two views of the evidence could have been found by the trial court. It was free to conclude, as it did, that the repairs to the uneven flooring were made without realization that a fundamental problem with the floor lurked below and that the problem was not known to the Owens. Because that type of determination is peculiarly within the province of the trier-of-fact, it is binding on this court once we determine, as we did, that there was evidence to support it. The existence of contrary evidence is simply not relevant.

Since the evidence did not show that the sellers concealed knowledge of a defect, the claim for fraudulent concealment must fail. The trial court did not err in awarding

judgment to the respondents.

Attorney Fees. Both parties seek reasonable attorney fees on appeal pursuant to paragraph 14(g) of the real estate contract. As the prevailing party, respondents are entitled to their reasonable fees for this appeal providing that they comply with RAP 18.1(d).

The judgment is affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

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Korsmo, J.

WE CONCUR:

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Schultheis, C.J.

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Kulik, J.